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ALEXANDER STEVAS,

No. 82-372

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondent "acknowledges that there is a split of authority among the circuits in the context of civil discovery on the appropriate test for determining whether work-product documents generated for unrelated litigation which has been terminated must be disclosed" (Br. in Opp. 17-18). However, because this is a Freedom of Information Act (FOIA) case, respondent contends (Br. in Opp. 7-11) that there is no "*direct* conflict" (Br. in Opp. 7; emphasis in original) between the decision in this case and the decisions of three other circuits holding that attorney work product from terminated litigation is privileged in the civil discovery context. Respondent's argument is inconsistent with *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), in which this Court concluded that Exemption 5 of the FOIA protects "those documents * * * normally privileged in the civil discovery context." Since three circuits have held that documents such as those at issue here are *always* privileged

in civil discovery (although the privilege may sometimes be overcome by a showing of need), those circuits would be compelled, under the approach required by *Sears*, to reach a result opposite to that of the court below.

2. Respondent unsuccessfully attempts (Br. in Opp. 11-14) to harmonize the court of appeals' decision in this case with *Sears* and *FOMC* v. *Merrill*, 443 U.S. 340 (1979). In both those cases, this Court pointed out that Exemption 5 was intended to permit an agency to withhold documents that would not "routinely" be disclosed to a private party in civil discovery (443 U.S. at 353; 421 U.S. at 149). Contrary to respondent's suggestion (see Br. in Opp. 12; emphasis in original), this Court clearly said more than "merely * * * that one must not view a party requesting documents pursuant to the FOIA as in the same position as a private litigant with the *most compelling* need for discovery." A "routine" case is not the same as the "most compelling" case.

Similarly, nothing in *Sears* supports respondent's suggestion (Br. in Opp. 12) that Exemption 5 protects only "those work-product documents which lie at the core of the rule." The portion of the Court's opinion upon which respondent relies simply discusses the scope of the attorney's work-product rule and does not even hint that its scope differs in the civil discovery and FOIA contexts.

Respondent misconstrues *Merrill* in a similar manner (see Br. in Opp. 12-14). Contrary to respondent's suggestion, this Court did not remand in *Merrill* for a determination whether documents that would be privileged in civil discovery should nevertheless be ordered to be disclosed under the FOIA. Instead, the Court remanded for a determination whether the relevant portions of the documents would be privileged in private litigation (see 443 U.S. at 346). The plain implication of the Court's opinion is that if

the district court were to conclude that the documents would normally be privileged in civil litigation—because of the harm caused by their release—then withholding under Exemption 5 would be authorized as well (see *id.* at 363-364).

3. Respondent contends (Br. in Opp. 4-7) that the decision below will affect only a "few cases" (Br. in Opp. 5) "[s]ince typically FOIA requests concern documents relating to on-going or potential litigation." Respondent's assertion is unsubstantiated, and, in any event, as we argued in our petition (Pet. 10), the concept of "potential * * * litigation" is meaningless for all practical purposes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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